

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. 21-cv-1263

JAMES MEDICRAFT, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON, *et al.*,

Defendants.

**ORDER DENYING MOTION FOR
RECONSIDERATION**

On April 3, 2024, the Court issued an Order re Additional Pretrial Rulings, which included a ruling that neither party's Independent Medical Examination ("IME") report will be excluded. ECF No. 334. Now pending before the Court is Defendants' Motion for Reconsideration of that ruling, requesting that the Court exclude Plaintiffs' IME as to JM and AM. Mot. Reconsider, ECF No. 345. Plaintiffs filed a response at the Court's request, and the Court held a hearing with counsel for the parties on May 15, 2024. The Court has carefully considered both party's arguments, and for the following reasons, denies Defendants' motion, but with an associated condition.

First, the Court reiterates its prior rulings on this matter:

- The Court denied Plaintiffs' request to exclude, on *Daubert* grounds, Dr. McGovern's IME report as to JM and AM. ECF No 329.

ORDER DENYING MOTION FOR RECONSIDERATION

- 1 • The Court found that although JM and AM did not fully cooperate with Dr. McGovern, and her report naturally suffered from their lack of cooperation, her
2 report was sufficiently reliable to be used by Defendant. ECF No. 334.
- 3 • The Court denied Defendants' motion to exclude evidence and argument regarding
4 JM and AM's psychological evaluations. *Id.*

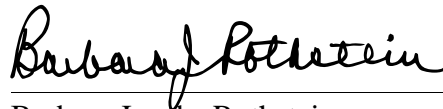
5 By their motion, Defendants now ask the Court to reconsider only the denial of their motion
6 to exclude Plaintiffs' expert evidence and argument regarding JM and AM's psychological
7 evaluations. Mot. Reconsider 2, 7-8. Plaintiffs argue that Defendants are simply reasserting prior
8 arguments, Opp'n 2, but the Court is mindful of its gatekeeping responsibility and therefore, will
9 not summarily deny Defendants' motion for reconsideration.

10 Defendants argue that the lack of cooperation by JM and AM so hampered Dr. McGovern
11 during the IME that she was unable to properly opine regarding certain mental health diagnoses,
12 such as PTSD, and what future treatment will be required. The Court appreciates, indeed has already
13 ruled, that Dr. McGovern's report suffered from the demonstrated hostility and lack of cooperation
14 by JM and AM. But Dr. McGovern had available to her Dr. Kliman's and Dr. Wynne's reports and
15 the underlying data that informed them, other evidence of record in this case, deposition testimony,
16 along with her own experience and the evidence she was able to elicit from her examination of JM
17 and AM, as well as her examination of EM. The Court finds that Dr. McGovern's report is
18 sufficiently reliable and that she can inform the jury regarding any limitations caused by the
19 children's lack of cooperation with the IMEs. The Court has determined that the sanction of
20 excluding Dr. Kliman's report as to JM and AM is not warranted. However, because Dr. McGovern
21 was disadvantaged by the lack of cooperation, the Court finds it appropriate to provide a mitigating
22 instruction, if necessary, to explain to the jury any inability on the part of Dr. McGovern to respond
23 to Plaintiffs' evidence regarding past trauma and damage issues regarding future treatment.

24 ORDER DENYING MOTION FOR RECONSIDERATION

1 Accordingly, the Court will not exclude Dr. Kliman's report or testimony related to JM
2 and AM's psychological evaluations. The parties are directed to draft an appropriate mitigating
3 instruction that the Court can provide to the jury if needed. Include the proposed instruction with
4 other instructions that comprise the parties' Joint Pretrial Statement, which is due July 12, 2024.

5 DATED this 22nd day of May 2024.

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8 Barbara Jacobs Rothstein
9 U.S. District Court Judge
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24 ORDER DENYING MOTION FOR RECONSIDERATION